No. 10128

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARTIN WOLDSON,

Appellant,

vs,

S. M. BAUMAN, ROY COPELAND and THE NATIONAL SURETY COMPANY, a corporation of the State of New York,

Appellees.

BRIEF OF APPELLEES

Upon Appeal from the United States District Court, For the District of Idaho, Northern Division

HON. CHARLES C. CAVANAH, District Judge

O. C. WILSON
Bonners Ferry, Idaho,

EVERETT E. HUNT
Sandpoint, Idaho,

Attorneys for Appellees

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PAUL P. O'BRIEN,

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SUMMARY OF CONTENTS OF BRIEF:

AUTHORITIES

Section 41-2531, Idaho Code Annotated

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Appellees.

BRIEF OF APPELLEES

Appellees controvert Appellant's Statement of the Case and present the following:

STATEMENT OF THE CASE

The Appellant, MARTIN WOLDSON, hereinafter referred to as the plaintiff, seeks a judgment against the Appellees, S. M. BAUMAN, ROY COPELAND and THE NATIONAL SURETY COMPANY, a corporation of the State of New York, hereinafter referred to as the defendants, for $7049.83 as damages and the entry of penalty against the individuals of $500.00 and their removal as Commissioners of Drainage District No. 1 of Boundary County, Idaho.

The defendant Bauman qualified as such commissioner on June 30, 1939, and the defendant Copeland on January 12, 1940.

The particular Complaint of the plaintiff herein is that the defendants Bauman and Copeland have not drained the lands of the Mirror Lake District and the plaintiff's demand for damages relates back and is attempted to be based upon an order of the Court made August 20, 1924; and all of the

evidence introduced by him relates to work which was done or ordered to be done as long ago as nineteen years and twenty years prior to the dates that the defendants Bauman and Copeland qualified as commissoners of said Drainage District.

It appears that the land now owned by the plaintiff is situated below the level of the main ditch system and there is not sufficient fall from his land to the outlet of the district to carry off the water emanating on plaintiff's land which said lands, to a large extent, are admittedly situated in what formerly was a natural lake.

The original plan for reclamation of this district was admittedly not sufficient to reclaim the area of land owned by the plaintiff and his adjoining land owners.

Between 1921 and 1940 various programs were attempted and cast aside in an endeavor to reclaim these lands. Booster pumps were installed and in the year 1940 new booster pumps of greater capacity and better design were installed by the defendants herein in an endeavor to reclaim the lands of the plaintiff.

Likewise, pumping the year-round was inaugurated by the two defendant commissioners in this action, which plan never heretofore had been followed.

Between the years 1925 and 1940 large sums of money were expended by the District and about $6,000.00 expended by property owners in an endeavor to reclaim the lands of the plaintiff. In other words, the plaintiff, regardless of all of the expenditures of money made in an endeavor to reclaim his land, and regardless of all of the expenditures of money made in an endeavor to reclaim his land, and regardless of the conduct of the defendants herein and funds expended by them for the same purpose, now brings this action for a personal judgment against these defendants, one of whom did not become a commissioner until 1939 and the other until 1940. In support of his contention, the plaintiff goes into the record to show the entire history of the attempt to reclaim his land since the years 1920, regardless of the fact that under no rule of law can the defendants herein be charged with liability for any acts done or any failure of duty of other commissioners prior to the

time of their appointment in 1939 and 1940. This he does in spite of the fact that in his own testimony (Tr. page 312) he says:

Q. About 1939 what did you do relative to insisting on the Commissioners proceeding to drain that land?

A. Well, I was talking with them from time to time every year trying to get them to do something to drain the land and they would do some from time to time but a very little, and **in 1939 I believe they did more that year than they ever did at one time before.**

Q. Take the year 1935, did they do any work at all in draining that land at that time?

Judge Hunt: Now I feel that we must object this is not binding upon these defendants when they took office only in 1939 and 1940. These are acts that the two defendants here had no authority to interfere with nor did they have anything to do with them in any way.

The Court: I think I suggested that they were not to be held for any act of the commissioners who held the office prior to their coming in.

The defendants contend that since they have been commissioners of the Drainage District they have done everything possible with the funds at their command and within the limits of their right as commissioners to expend funds

of the Drainage District on maintenance to reclaim the lands of the plaintiff and further contend that the plaintiff's remedy, inasmuch as his problem is one of drainage and not maintenance, is found in Section 41-2531 I.C.A. as amended by Chapter 49, Idaho Session Laws of 1935. And the defendants further contend that after having waited approximately nine years during a period of various changes in the personnel of the Board of Commissioners of the Drainage District the plaintiff is now estopped from bringing this action against these defendants.

It is further contended by the defendants and not disputed that since these two defendant commissioners qualified as commissioners of said District that over 90 per cent of all district funds available for maintenance has been expended in the Mirror Lake District, comprising approximately 700 acres, 220 of which is the property of the plaintiff, notwithstanding the fact that the entire district comprises approximately 4400 acres.

REPLY TO THE APPELLANT'S BRIEF

Briefly replying to the plaintiff's statement of the case, we submit the following:

On Page 5, paragraph 1 it is said, ' The commissioners then alleged that this would be done and that when it was done the land would be suitably drained and that it was a necessary expense to be borne by the entire district (P. 199)." Once again we must state that the commissioners referred to were not the defendants in this action. Again on Page 7 of the Brief in the third paragraph it is stated, "And it further appearing that the above mentioned Order of the Court has not been complied with by the commissioners that have since been in office." Again this does not refer to the defendants in this action. On Page 8 of the Brief in the first paragraph thereof it is stated, "This was the third Court Order requiring this work to be done.

"Under the last order the commissioners did proceed to do some work and spent the entire $23,000.00 * * *."

The order referred to (Tr. pages 31-34) is as follows:

In the Matter of Drainage District No. 1
of Boundary County, Idaho.

ORDER

In the above entitled matter, the Commissioners of Drainage District No. 1 having made application to the Court for an Order for permission to do additional work and incur additional expense in connection with the drainage of the land within said Drainage District, which has not been drained by the work heretofore done, said application being based upon Findings of Fact and Conclusions of Law and Order and Decree made and entered by the Court in the above entitled matter on the 16th day of March, 1925, by which it was determined by the Court that certain additional work should be done by the Commissioners of said District for the purpose of furnishing additional drainage to the land of certain objectors who appeared in opposition to the confirmation of certain assessments proposed to be made against the land of said objectors within the limits of said district and it appearng from the report of the present Commissioners of said Drainage District that there has been a change in the Commissioners of said District since said Order was made and it further appearing that the above mentioned Order of the Court has not been complied with by the Commissioners in the office at the time said order was made or by the Commissioners that have since been in office,

And whereas, by said above mentioned Order it was adjudged that an emergency existed requiring the construction of certain work, the cost of which would be borne as

maintenance charge against said District and the Commissioners on this application having (27) presented with their application, plans of their Engineer for the construction of the work heretofore ordered to be done by the Court pursuant to the above mentioned Order made March 16, 1925, the total estimated cost of said improvement being Twenty Three Thousand ($23,000.00) Dollars in accordance with a detailed estimate hereto attached, reference to which is hereby made and the same made a part hereof.

Wherefore, it is ordered, that a new outlet be constructed by the Commissioners of said Drainage District No. 1 with a grade approximately two (2′) feet lower than the present outlet of said District,, said original outlet not to be changed or interfered with at all, the new outlet to be located as follows:

> Beginning at the junction of the Main and Fry Lake ditches of Drainage District No. 1, which point is about 300′ North of the Southwest (SW) corner of Lot Six (6) Sec. 19, Twp. 62 N. Rg. 1 E. B. M. running thence Northerly across said Lot Six (6) to the left bank of the Kootenai River a distance of about Five Hundred (500′) feet.

The Commissioners are further ordered, to cause the necessary pipe to be put in place for the purpose of carrying the water out of said Drainage District thru said proposed outlet and also to cause all pipes to be installed that may be necessary or advisable to successfully drain land and conduct the water thru said outlet.

The Commissioners are further ordered, to deepen and clean out the ditches now constructed in said Drainage District to such depth

as may be necessary and to construct such other ditches within said Drainage District as may be necessary to sufficiently drain all the land within said Drainage District to such extent as may be necessary to make all of the land within said Drainage District suitable for agricultural purposes. (28)

The commisisoners are further ordered to install a pump at the following location, to-wit:

> Approximately at the section corner common to Sections 31 and 32, Twp. 62 N., R. 1 E.B.M. on the township line between Twp. 61 and 62 N., R. 1 E.B.M.

and cause such pump to be operated at all times that may be necessary to provide suitable drainage for the land not drained by the drainage system as now constructed, provided, however, that in the discretion of the Commissioners the pump now in use may be moved to the above mentioned location instead of installing an additional pump if the Commissioners shall determine that the result can be accomplished by moving the location of the pump now installed.

Done in Open Court this 20th day of February, 1928.

W. F. McNAUGHTON,
District Judge.

(Endorsed): Filed Mar. 6, 1941. (29)

The record shows compliance with that Order of the Court. (Tr. pages 1239-140 and subsequent testimony). It must be stated, however, that **neither this Order nor any other**

Court Order was ever directed to the defendant commissioners in this action.

Again in the last paragraph of plaintiff's Brief on Page 8 it is stated, "Thereafter the commissioners agreed with him that they would not levy any more assessments against his land until they had drained the same. They did not follow this agreement but continued to levy maintenance charges against the land in controversy, although never draining the same." Needless to say, Commissioners have no power to refrain from levying assessments without order of Court and **the commissioners referred to were not the defendant commissioners** herein.

On Page 12 of plaintiff's Brief it is stated, "All Mr. Woldson wanted and ever demanded was that the ditches be cleaned out as originally provided for." The record shows that all of these ditches were cleaned out in 1939, twice in 1940, and twice in 1941. (Tr. pages 400, 421, 422)

Testimony of Roy Copeland:

Q. Since you became commissioner of Drainage District (321) Number One, I will ask you if you and the other Commissioners have done anything in an effort to keep the

ditches open in the southern end of the district, known as Mirror Lake?

A. Yes, sir, we have been over them three or four times.

Q. With a dragline?

A. Yes sir, and over these slide areas I think that there have been two different times besides the times we were through the rest of the area.

Page 421, Testimony of S. M. Bauman:

Q——The question is why did you pump it out of Drainage District number one in the winter time? A. To get rid of the water.

Q. Prior to 1939 had the Commissioners done any pumping in the winter time?

A. I don't think so, not to my knowledge.

Q. Now, Mr. Bauman, since you became Commissioner state (344) whether or not it is customary for the Commissioners to clean out the main ditches in Mirror Lake.

A. Yes sir, that is the height of our ambition.

Q. That was the custom.

A. Yes, it was our ambition to keep them clean.

Q. How do you do that?

A. We have gone through from the booster pump to the junction in 1940, 1941 and 1939. In 1941 we went quite a bit further and at intervals we had slides cleaned out. When the dragline was operating on the south side of the main ditch whenever it would come handy to

reach in and clean out these slides it was done, we would have that done.

Q. How often was that done in 1941, 1939 and 1940?

A. In 1940 it was done twice.

Q. In 1939? A. Cleaned it out once in 1939.

Q. Have you cleaned it out this year?

A. Yes sir.

Q. More than once?

A. Yes sir, three times, a part of it.

Mr. Woldson himself testified: (Tr. page 312)

Q. About 1939 what did you do relative to insisting on the Commissioners proceeding to drain that land?

A. Well, I was talking with them from time to time every year trying to get them to do something to drain the land and they would do some from time to time but a very little, and **in 1939 I believe they did more that year than they ever did at one time before.**

Q. Take the year 1935, did they do any work at all in draining that land at that time?

Judge Hunt: Now I feel that we must object this is not binding upon these defendants when they took office only in 1939 and 1940. These are acts that the two defendants here had no authority to interfere with nor did they have anything to do with them in any way.

The Court: I think I suggested that they were not to be held for any act of the commis-

sioners who held the office prior to their coming in.

It may be noted that the defendant Bauman qualified as a commissioner on June 30, 1939 but that the defendant Copeland did not qualify as a commissioner until January 12, 1940. By Mr. Woldson's own admission we find that real work on this project commenced when Bauman became a commissioner in 1939. Nevertheless, the plaintiff seeks to punish these two defendants for acts allegedly occurring in the nineteen or twenty years prior to the date that these two defendants assumed office.

At the top of Page 16 of plaintiff's Brief he states, " . . . Decided it upon the question that in his opinion the commissioner had a discretion in cleaning out the ditches and not doing the work, or not doing the work, to drain the land as they in their opinion thought best." The Findings of Fact and Conclusions of Law of the Trial Judge are brief but completely cover all pertinent questions involved. However, plaintiff's statement as quoted above is entirely in conflict with the Conclusions of Law and Findings of Fact of the Trial Judge.

EVIDENCE

We have stated before that notwithstanding the fact that the defendant Bauman qualified as a commissioner on the 30th day of June, 1939 and the defendant Copeland qualified as a commissioner on the 12th day of January, 1940, nevertheless, the plaintiff in his testimony and in his Brief repeatedly refers to alleged acts of malfeasance, misfeasance and nonfeasance of Drainage District commissioners during a period of nineteen years and twenty years prior to the dates that these two defendants assumed office. The Trial Judge permitted this testimony for the purpose of showing the creation and organization of the District and for the purpose of showing what work and what amount of funds had been expended in an effort to drain the lands in question. Nevertheless, the plaintiff, throughout his entire case, has attempted to build up a case against the defendant commissioners herein by virtue of alleged misfeasance of former commissioners of this District. The theory of the Trial Judge is well stated in the following: (Tr. pages 96, 97, 98 and 100)

(Argument of Counsel)

The Court: Under the statement as to the period of time involved here, where you are suing the two parties individually and seeking judgment individually, not against the District as a District but individually, it would seem under the law that the period of their liability would be from the time they were appointed as members of the Board and attempted to function as members. Evidence prior to that time as to whether the District had made assessments, seems to me as against these men would be immaterial. That these defendants, when they came into the District, that is, when they became members of the Board, that they refused to perform their duties under the Order of the State Court, that, of course, would be another (8) question, but to go back in 1920, where the pleadings admit certain things, and to try to hold these defendants for the conduct of the District, seems to me that it may be entirely without the pleadings.

Mr. Whitla: We are not trying that.

The Court: But you are suing these men individually here. It would be unjust.

Page 97.

The Court: . . . But to go back of those years and say these men would be liable for (83) making or failing to make assessments and drain the land, that would not be the law, and would not be within the issues here.

Page 98.

The Court: It occurs to me that under these pleadings that you could show that this land was within the District. Let's see, I think it is

admitted. The organization of the District is admitted. That the land is within the District is admitted. Now then, at the time these three individuals who are now commissioners came into office, the fact that the land had been previously assessed by the District and that the land had not been drained could not be charged to these men, they would not be liable for what the plaintiff had paid previous to that time or as to its application. If there was a liability, it would be the District or the Commissioners previous to these defendants. They would not be liable prior to the time they came into office. You can show the assessments but it would be acts of other people, and they would (84) be liable only from the time they came into office and not previous neglect of others.

It would be unjust to say that you could put men in office nineteen years after something was done and hold them responsible. I cannot see that they are liable.

Page 100.

The Court: I will state again that the parties have the right to show if they can, that this District was organized and when; whether this land of the plaintiff's was and is in that District and subject to be assessed for drainage purposes; whether the land was drained or was not, and up to the time these two men were appointed or made members of the Board, what was the condition that confronted them when they (86) entered on the duties or the office of Commissioners. They are chargeable with their own neglect. Now, if you were saying the District it would be a different matter, but you are picking out these two men who were put on this commission on a certain date. You can show the condition as I have stated but

they are bound by the date these men were put in office. Now, as to whether the previous Commissioners drained this land or not is immaterial here. It would be unjust to hold officers in damage for what someone else might have done or not have done. Now you understand, let's go ahead.

That a determined effort was made by the defendant commissioners to drain the land of the plaintiff is shown by the testimony of the witness John Davidson, who by the way, at the time of the hearing, was a commissioner of the District and was purchasing lands in this District from the plaintiff on contract.

Tr. page 154. (Testimony of John Davidson)

Q. Do you pump night and day, or how do you pump?

A. You have reference to the booster pump.

Q. Whatever pumps you use in draining that land.

A. We have kept the pumps running for the benefit of the District.

Q. Do they run summer and winter?

A. At present, yes sir.

Q. Since 1938 have you run them in the winter as well as in the summer? A. Yes sir.

Q. Every month during the year.

A. The last two years.

Tr. page 159-160.

Q. In order to get the water out of Mirror Lake, what have the Commissioners done to assist the water in its flow?

A. Built a pumping plant.

Q. You call that what?

A. Booster pump.

Q. How many booster pumps have you?

A. Two pumps in that plant.

Q. You have a pump where the water gathers and you pump it from there, you give it a kick and boost it on? A. Yes sir. (131)

Q. Have you several pumps?

A. Two.

Q. Two that have been in operation last year?

A. Yes sir.

Q. When did you get the last pump?

A. Last year.

Q. Isn't it a fact that you got a bigger pump because the smaller pump would not carry the load?

A. We have a modern system, we have a smaller motor with a bigger capacity.

Q. You got a bigger pump last year?

A. Yes sir.

Q. That was while Mr. Copeland and Mr. Bauman were on the Board?

A. Yes sir.

Q. Up to that time you used smaller pumps?

A. Yes sir.

Q. Did the Commissioners get any paddle wheels to kick the water along in those ditches?

A. That was an experiment a good many years ago.

Testimony Roy Copeland (Tr. page 403)

Q. Were you familiar with the pumping in 1927?

A. Well, not very much, no.

Q. Do you know whether they pumped continuously?

A. In 1927.

Q. Yes. A. I know they did not pump continuously, I know that.

Q. What period of the year did they pump?

A. They pumped during the spring and until after the crop (324) was taken in.

Q. As a rule there was no pumping in the fall and winter?

A. No sir.

Q. Since you have been a Commissioner and since Mr. Bauman has been a Commissioner, tell the Court what the policy has been in regard to pumping.

A. Since I have been Commissioner the pumps run continuously, they are automatic, they run whenever there is enough water for them to start.

Q. Every month of the year.

A. **Yes sir, every month of the year. They started in the fall of 1939.**

Testimony of S. M. Bauman. (Tr. pages 421-422)

Q. ——The question is why did you pump it out of Drainage District number one in the winter time?

A. To get rid of the water.

Q. Prior to 1939 had the Commissioners done any pumping in the winter time?

A. I don't think so, not to my knowledge.

Q. Now, Mr. Bauman, since you became Commissioner state (344) whether or not it is customary for the Commissioners to clean out the main ditches in Mirror Lake?

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Q. What was the custom.

A. Yes, it was our ambition to keep them clean.

Q. How did you do that?

A. We have gone through from the booster pump to the junction in 1940, 1941 and 1939. In 1941 we went quite a bit further and at intervals we had slides cleaned out. When the dragline was operating on the south side of the main ditch whenever it would come handy to reach in and clean out these slides it was done, we would have that done.

Q. How often was this done in 1941, 1939 and 1940?

A. In 1940 it was done twice.

Q. In 1939? A. Cleaned it out once in 1939.

Q. Have you cleaned it out this year?

A. Yes sir.

Q. More than once?

A. Yes sir, three times, a part of it.

Testimony of Martin Woldson. (Tr. page 336)

Q. Since 1939 what has been the policy of the Commissioners relative to pumping?

A. You mean do they pump in the winter?

Q. Yes, do they pump in the winter time?

A. Yes sir.

Q. Has the policy that the Commissioners adopted after 1939 had anything to do with the draining of your land since 1939?

A. With the whole district.

Q. That helped drain it? A. Yes sir.

In addition to the policy of pumping the year-round, first established by the defendants in this action, a new and enlarged booster pump was purchased by the drainage district commissioners after the defendant Bauman qualified as a commissioner.

Tr. pages 220-421. (Testimony S. M. Bauman)

Q. That surface water drains to the District? A. Yes, it cannot go anywhere else.

Q. Where was, — strike that, — were you familiar with the old booster pump?

A. Quite so.

Q. What was that used for?

A. To raise the water out of the sump and throw it over the dam to the ditch below.

Q. How high does that raise the water?

A. Around eight or nine feet.

Q. Were those pumps changed at any time recently?

A. In 1939 when I went on the Board we had a pump that was connected up with two motors, fifty horse electric motor and a fifteen horse power motor. When there was lots of water we used the fifty horse motor and when there was just a little water we used the fifteen. We put in a new one in 1940 about the first of the year.

Q. What type of motor was that?

A. Fairbanks-Morse

Q. Is that pump automatic? A. Yes sir.

Q. Prior to that time had you any automatic pump there?

A. Not there, no sir.

Q. How does that run, as to months and seasans?

A. The new one?

Q. Yes.

A. That depends on the flow of water.

Q. Is it available to run every day of the year?

A. Yes sir.

Q. Does it run every day, if there is water?

A. Yes sir.

Q. That is, if there is water in the sump.

A. Yes.

Q. For how long has that automatic pump been there?

A. We started it about the first of the year 1940. I cannot say whether it was late in December or the first of January, 1941, — I mean in 1940.

Q. In 1939 did you have that pump run winter and summer?

A. I don't think it ran all the time until 1939.

Q. Did it run in the winter of 1939?

A. Yes sir.

Along the foothills adjoining the plaintiff's land there was originally constructed what was known as a rim ditch. This ditch was for the purpose of collecting surface water that drains down to the low lands from the surrounding hills. The plaintiff himself testified that it was necessary for him to clean out the rim ditch at his own expense, yet he testifies (Tr. page 316) as follows:

Q. In 1940 what was the condition of the ditches then. Was any work required at that time?

A. Yes sir, it was required to go over all of the dtiches.

Q. Mr. Farnum went over them in 1939. How many years had it been since these dragline ditches and the rim ditch were cleaned out before that?

A. A number of years past.

And thereafter to the same point the plaintiff testified (Tr. page 332)

Q. This work that Mr. Farnum did, was he employed by the District? A. Yes sir, in 1939.

Q. It was paid for by the District?

A. Yes sir.

Q. You didn't pay for any of it? A. No sir.

Further, the plaintiff refused to allow the defendants to build a new ditch around the slides in the ditch draining his land.

Testimony Martin Woldson. (Tr. pages 334-335)

Q. It is a fact that in the spring of 1941, Commissioners Bauman and Copeland asked permission to build a ditch around these slides?

A. They talked to me.

Q. They asked for that permission?

A. We were talking about it, whether it would be better.

Q. Yes, and they asked for permission?

A. They didn't ask permission.

Q. I will ask you if it is not a fact that you refused to construct the new ditch?

A. I don't think I refused any permission, but I told them that it wasn't a good idea to cut off that land behind (249) and asked how could we drain that land behind.

Q. And you told them not to do it?

A. **Yes, I told them not to do it.**

ASSIGNMENTS OF ERRORS

The plaintiff devotes a large portion of his Brief in a plea that this case should be reversed due to the fact that the Trial Judge did not make Findings of Fact concerning all of the material issues. The only material question of fact in this case is whether or not the defendants Bauman and Copeland are guilty of misfeasance, nonfeasance or malfeasance in their duties as commissioners of this District. The Trial Court made a specific finding in paragraph three of its Findings of Fact that these defendants were not guilty of malfeasance, misfeasance or nonfeasance in their duties as commissioners of this District.

Included in that same paragraph was a finding "That said defendants are not personally liable on honest intentions or errors in judgment as commissioners of said Drainage District." This finding may or may not be more

properly a Conclusion of Law, but, in any event, such a Finding is in accordance with the law and the facts in this case.

As stated heretofore, the Trial Judge permitted evidence to show the creation of the District in 1920 and certain Court records for the sole purpose of obtaining the history of the transaction and enlightening the Court as to the issues involved but not for the purpose of proving any liability on the defendants Bauman and Copeland for the acts of their predecessors. These facts being admitted and being purely collateral issues, do not require specific Findings of Fact by any Trial Judge.

ARGUMENT

The defendants contend, and have conclusively shown as heretofore set forth, that they are not liable in damages and are not guilty of nonfeasance, malfeasance or misfeasance.

They further contend that the plaintiff's remedy in obtaining the drainage of his land is not an expense of maintenance which should be borne by the District and that if the plaintiff desires his land properly drained, as opposed to the maintenance of ditches now constructed,

he must comply with the provisions of Section 41-2531, Idaho Code Annotated, which is as follows and as it has been construed by the Supreme Court of the State of Idaho:

Section 41-2531:

"Additional construction work and assessments. — In any case where the **work** set out in the plan for **drainage** as provided in this chapter, **is found insufficient a new estimate of benefits** may be made, based on the **additional work proposed,** and **additional assessments** may be made on **the lands benefited** in conformity with the procedure hereinbefore provided, and the lands in said district, or any part of such lands, shall **be assessed in proportion** to the **benefits estimated as accruing to such lands because of such additional work and improvements.**"

The above section was construed by the Court in McDonald vs. Pretzl, 60 Idaho 354, and the Court says, at page 357:

"Appellant sought a writ of mandate to compel the commissioners of respondent district to levy assessments to pay principal and interest of these remaining bonds. The commissioners refused to do so on the ground the assessment of costs of $118,547.00, as first confirmed, was the limit of liability resting on the landowners; the additional cost not having been authorized by court order as provided and assertedly required in Section 41-2531, I.C.A., or Section 41-2530 I.C.A., passed in 1919, Idaho Session Laws,

chapter 183, page 562, and the amendment of 1919 to section 58, chapter 168 of Title 32, Compiled Laws (chap. 16, sec. 23, Sess. Laws 1913, p. 73). These amendments are now contained in Sections 41-2561, 41-2562, and 41-2563, I.C.A.

'The trial court considered correct respondents' theory that the assessed cost for construction as confirmed by the Court was the limit of liability (in the absence of further court order), and entered judgment accordingly denying the writ, hence this appeal.

'The sole and ultimate question of law involved resolves around this conclusion of the trial court:

'III, That the commissioners of said District have no right or authority to make calls or assessments against the lands within said District for any or all of the above named purposes (construction and preliminary proceeding costs) in excess of 100 per cent of said assessment roll as confirmed by the Court, '**without court action.**

'Appellant contends that as long as the total assessments for construction costs, though in excess of those first confirmed, are within the assessment of benefits as found by the court on confirmation (i.e. $440,869.-11) the commissioners had authority to make such additional assessments without court order or notice to the landowners; and that if this theory is not correct, since all the money paid out by the District in construction costs was for the benefit of the landowners, equity justifies the assessments to repay the bondholders for the amount they contributed'."

The Court held with the conclusion of the trial Court.

And in the same case used the following language at pages 363 and 364, which is peculiarly applicable to this case:

> "It is clear that when the commissioners of said district became aware of the fact that the funds raised by the bond issue were about to be exhausted and that a great amount of work was yet to be done they should have proceeded to levy an additional assessment in the manner provided by said section 4522. As we understand appellant's position he is seeking to avoid payment of the proportion of the additional expense assessed against his land upon the sole ground that the drainage commissioners attempted to make said assessment a lien upon his land without submitting it first to the District Court and, after notice to all interested parties, obtaining confirmation of said assessment by the court. From the findings of the Court, which are sustained by the evidence, **it is clear that appellant had ample opportunity to go into court and compel the commissioners to first submit another estimate of the proposed expenditures to the court and obtain its confirmation before proceeding with the additional work.**"

CONCLUSION

We respectfully submit:

That the defendant Bauman was appointed as commissioner of the Drainage District on

the 30th day of June, 1939 and is not liable for any of the acts of his predecessors and the evidence conclusively shows that he has not been guilty of any acts of misfeasance, malfeasance or nonfeasance.

That the defendant Copeland was appointed as commissioner of the Drainage District on the 12th day of January, 1940 and is not liable for any of the acts of his predecessors and the evidence conclusively shows that he has not been quilty of any acts of misfeasance, malfeasance or nonfeasance.

That the National Surety Company, bondsmen for the above named defendants Bauman and Copeland, are not liable upon their bonds.

That the Trial Court did not err in dismissing this action for the reason the plaintiff has failed to prove any acts of misfeasance, malfeasance or nonfeasance upon the part of the defendants.

That on the contrary, the proof conclusively shows, particularly by the testimony of the plaintiff himself, that more work was done in an effort to drain the plaintiff's land during the years 1939, 1940 and 1941 than ever before.

That all year-round pumping was inaugurated by the District after the defendant Bauman became a commissioner thereof and that new and enlarged pumping equipment was established after the defendants Bauman and Copeland became commissioners of the District. Further, that the ditches, including the so-called rim ditch, were cleaned out at least once every year after these defendants qualified as commissioners, a policy, which according to the testimony of the plaintiff himself, had not been in effect for several years prior to the appointment of these two commissioners.

Respectfully submitted,

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